

Appl. No. 10/787,266
Atty. Docket No. AA615M2
Amdt. dated July 20, 2007
Reply to Office Action of February 20, 2007
Customer No. 27752

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REMARKS

Claim Status

Claims 1-9 and 11-15 are pending in the present application. No additional claims fee is believed to be due.

Claim 10 is canceled without prejudice.

Rejection Under 35 USC §103(a) Over US 5,075,026 (Loth)

Claims 1-2, 4, 6-9, and 11-15 have been rejected under 35 USC §103(a) as being unpatentable over Loth. This rejection is traversed as Loth does not establish a *prima facie* case of obviousness because it does not teach or suggest all of the claim limitations of Claims 1-2, 4, 6-9, and 11-15. Therefore, the claimed invention is unobvious and that the rejection should be withdrawn.

Specifically, Applicants would like to draw attention to the statement in the Office Action dated June 13, 2006, discussing Loth:

"It would have been obvious to one of ordinary skill in the art at the time the invention was made to have employed a dispenser, i.e., pump-type sprayer wherein the foam generated in the dispenser would exhibit a foam having a foam to weight ratio within those recited because similar ingredients with overlapping viscosity and similar dispenser have been used."

As discussed in the June 13, 2006, Dr. Rafael Ortiz Declaration ("Ortiz Declaration"), one of skill in the art would not equate a pump-type dispenser discussed in Loth with the foam-generating dispenser required by the present claims. Rather, a pump-type dispenser would be equated to a trigger type sprayer.

The Office Action of February 20, 2007, denies that Loth et al. describes a "pump-type sprayer" in a meaningful way. The Office Action of February 20, 2007, further addresses the Ortiz Declaration by stating that "none of these sprayers are identified or specifically disclosed in Loth to make a meaningful side-by-side comparison." Page 3. Applicants submit that it cannot be obvious to use the pump-type

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sprayer of Loth as a foam-generating dispenser if the pump-type sprayer of Loth is not sufficiently described so as to determine the structure or function of the sprayer. Without an enabling disclosure, the reference is not available as prior art. MPEP § 2121.01. Merely naming or describing the subject matter is insufficient if it cannot be produced without undue experimentation. *Elan Pharm., Inc. v. Mayo Found. For Med. Educ. & Research*, 346 F.3d 1051, 1054, 68 U.S.P.Q.2d 1373, 1376 (Fed. Cir. 2003).

The Office Action of February 20, 2007 only makes sense if the claims are read to require a pump-type sprayer rather than a foam-generating dispenser. Otherwise, the Office Action of June 13, 2006 provides that 1) the claim limitations directed to foam density are not disclosed in Loth et al.; and the Office Action of February 20, 2007 provides that 2) Loth et al. does not provide sufficient detail about the disclosed pump-type sprayer to infer a specific structure or function.

In effect, the Office Action of February 20, 2007 reads limitations out of the claims, replacing them with terms found in the references cited. This is not a simple case of rewording the claim limitation, but one of recharacterizing or even ignoring a claim limitation in order to apply vague references to an allegedly similar structure. This is impermissible. "To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art." MPEP § 2143.03. See also *In re Kahn*, 441 F.3d 977, 986, 78 U.S.P.Q.2d 1329, 1335 (Fed. Cir. 2006) (identification of each claim element in the prior art is necessary, but not sufficient, to defeat patentability).

Applicants note that the Ortiz Declaration makes reference to exemplified formulations. Although not discussed in the Office Action of February 20, 2007, Applicants have realized that while the copending application 10/787,343 included such examples, the present specification did not include such examples. Applicants have amended the specification (above) to now include the referenced examples of the Ortiz Declaration.

The Office Action of February 20, 2007, also argues that the Ortiz Declaration is ineffective because "the showing is not commensurate in scope with the claims." Page 3. Applicants can find no authority for the requirement that a declaration, submitted to refute

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an unsupported allegation of similarity to a cited reference, provide data commensurate in scope with the claims.

The Office Action of February 20, 2007 further alleges that the Ortiz Declaration is flawed because it "did not specify which formulation was exactly used for the showing," and because "it is not clear whether the same formulation is used for the tests" reported. Pages 3 – 4. As demonstrated below, these objections are overwrought.

Applicants submit that the Ortiz Declaration was intended to refute the allegation of the Office Action that "similar" compositions in "similar" dispensers would yield the claimed foam-to-weight ratio. *See* Applicant's Remarks submitted November 13, 2006 at Page 5 ("In the event one of skill in the art would equate a pump-type sprayer with a foam-generating dispenser, as shown by the testing data presented in Dr. Ortiz's declaration, the foam to weight ratio is not within the limits in the present claims."). Therefore the Ortiz Declaration is not subject to the requirement that declarations to establish surprising results must provide data commensurate in scope with the claims.

The Office Action of February 20, 2007 alleges that the Ortiz Declaration is defunct because "Applicants allege that the compositions similar to those discussed in the present application . . . were used but did not specify which formulation was exactly used." Page 3. Further, the Office Action of February 20, 2007 states, "it is not clear whether the same formulation is used for the tests." Pages 3 – 4.

The descriptions of the test performed are adequate in light of the intended purpose of the declaration. The composition used was consistent with the exemplary embodiments described in the specification. Further, although Applicants regret any lack of clarity, the consistent use of singular forms and comparative terms strongly suggest that the same composition was used in generating data from each of the two dispensers tested. For example, the Ortiz Declaration explains that "the" composition, when used in a pump-type sprayer "versus" a foam-generating dispenser, "does not" generate the foam to weight ratio claimed in the present application. Ortiz Declaration at ¶5.

Applicants submit that the description of the test performed is adequate in light of the Office Action's vague assertions of "similar" dispensers. More detailed and more thorough testing would not be any more convincing in the absence of a more structured framework for the rejection. Stated another way, no amount of data will overcome the

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speculation that *some* kind of pump-type sprayer *might* satisfy the claim limitations.

"If rebuttal evidence of adequate weight is produced, the holding of *prima facie* obviousness, being but a legal inference from previously uncontradicted evidence, is dissipated. Regardless of whether the *prima facie* case could have been characterized as strong or weak, the examiner must consider all of the evidence anew." *In re Piasecki*, 745 F.2d 1468, 1472, 223 U.S.P.Q. 785, 788 (Fed. Cir. 1984). Even if the initially presented case for *prima facie* obviousness is taken as compelling, the production of evidence requires reassessment of "all the evidence and should not be influenced by any earlier conclusions." MPEP § 2144.08(III) (citing to *In re Piasecki*, 745 F.2d at 1472-73, 223 U.S.P.Q. at 788). "[T]he nature of the matter sought to be established, as well as the strength of the opposing evidence, must be taken into consideration in assessing the probative value of expert opinion." *In re Oelrich*, 579 F.2d 86, 91, 198 USPQ 210, 215 (CCPA 1978).

As described above, the alleged failings of the Ortiz Declaration are inapt or overstated. The Ortiz Declaration is therefore the only evidence of record as to the meaning of the disclosure of Loth et al. to one of skill in the art.

"If the examiner is relying on personal knowledge to support the finding of what is known in the art, the examiner must provide an affidavit or declaration setting forth specific factual statements and explanation to support the finding." MPEP § 2144.03C. *See also* 37 C.F.R. § 1.104(d)(2). "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. ___, 14 (2007) (quoting *In re Kahn*, 442 F.3d at 988, 78 U.S.P.Q.2d at 1336 (Fed. Cir. 2006)).

As such, Applicants submit that Loth does not teach or suggest all of the claim limitations of Claims 1-2, 4, 6-9, and 11-15 and, therefore, does not establish a *prima facie* case of obviousness (see MPEP 2143.03). Applicants respectfully request that the rejection of Claims 1-2, 4, 6-9, and 11-15 under 35 U.S.C. § 103(a) over Loth be withdrawn.

Rejection Under 35 USC §103(a) Over US 5,075,026 (Loth) in view of US 5,635,469

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(Fowler et al.)

Claim 3 is rejected under 35 U.S.C. § 103(a) over Loth in view of Fowler et al..

Applicants submit and discuss above that Loth does not establish a *prima facie* case of obviousness because it does not teach or suggest all of the claim limitations of Claim 3 alone or in view of Fowler et al.. As such, Applicants submit that a *prima facie* case with respect to all of the claim limitations of Claim 3 has not been established and that the rejection under 35 U.S.C. §103(a) should be withdrawn.

Rejection Under 35 USC §103(a) Over US 5,075,026 (Loth) in view of US 5,679,630 (Baeck et al.)

Claim 5 is rejected under 35 U.S.C. §103(a) over Loth in view of Baeck et al.

Applicants submit and discuss above that Loth in view of Baeck et al. does not establish a *prima facie* case of obviousness because it does not teach or suggest all of the claim limitations of Claim 5. The Office Action does not cite Baeck et al. with respect to a foam-generating dispenser, rather it is cited as teaching protease enzymes having improved proteolytic activity which can be used in any detergent composition or concentrated detergent compositions where high sudsing and/or good insoluble substrate removal are desired.. As such, Applicants submit that a *prima facie* case with respect to all of the claim limitations of claim from with Claim 5 depends, likewise does not present a *prima facie* case with respect to all of the claim limitations of Claim 5 and that the rejection under 35 U.S.C. §103(a) should be withdrawn.

Rejection Under 35 USC §103(a) Over US 5,075,026 (Loth) in view of US 3,422,993 (Boehm et al.)

Claim 9 is rejected under 35 U.S.C. §103(a) over Loth in view of Boehm et al.

Applicants submit and discuss above that Loth in view of Boehm et al. does not establish a *prima facie* case of obviousness because it does not teach or suggest all of the claim limitations of Claim 9. As such, Applicants submit that a *prima facie* case with respect to all of the claim limitations of claim from with Claim 9 depends, likewise does not present a *prima facie* case with respect to all of the claim limitations of Claim 9 and that the rejection under 35 U.S.C. §103(a) should be withdrawn.

Conclusion

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In light of the above remarks, it is requested that the Examiner reconsider and withdraw the rejection under 35 U.S.C. § 103(a). Early and favorable action in the case is respectfully requested. Applicants' attorney invites the Examiner to contact her with any questions the Examiner may have regarding this application.

This response represents an earnest effort to place the application in proper form and to distinguish the invention as now claimed from the applied references. In view of the foregoing, reconsideration of this application, entry of the amendments presented herein, and allowance of Claims 1-9 and 11-15 is respectfully requested.

Respectfully submitted,

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